

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

VICTORIA T.,

Plaintiff,

v.

Civil Action No.
5:20-CV-1238 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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VALERINO, LLP
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FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
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MOLLY CARTER, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on January 19, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant’s motion for judgment on the pleadings is
GRANTED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: January 20, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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VICTORIA T.,

Plaintiff,

vs.

5:20-CV-1238

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on January 19, 2022, the
HONORABLE DAVID E. PEEBLES, United States Magistrate
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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1 (The Court and all counsel present by
2 telephone.)

3 THE COURT: All right. Let me begin by thanking
4 both counsel for excellent and spirited presentations, I have
5 enjoyed working with you in this matter.

6 Plaintiff has commenced this proceeding pursuant to
7 42 United States Code Section 405(g) to challenge a
8 determination by the Commissioner of Social Security finding
9 that she was not disabled at the relevant times and therefore
10 is ineligible to receive disability benefits.

11 The background is as follows: Plaintiff was born
12 in November of 1965. She is currently 56 years of age. She
13 was 46 years old at the alleged onset of disability on
14 February 16, 2012. Plaintiff stands between five-foot-five
15 and five-foot-six inches in height and has weighed at various
16 times between 186 and 190 pounds, making her clinically
17 obese. She graduated from high school and was in regular
18 classes while attending school. Plaintiff lives in
19 Chittenango, New York with her husband. She is right-handed
20 and drives and possesses a driver's license. Work wise,
21 plaintiff stopped work on July 10, 2012, although as I will
22 note in a moment, she has had some work activity since that
23 time. When she was employed full time, she worked as a baker
24 and as a maintenance and floor cleaner person at Walmart.
25 She has also worked in the past as a part-time horse handler

1 and as a part-time cashier and stocker at a Dollar General.
2 The position there ended due to a Workers' Compensation
3 injury that she suffered on February 16, 2012. In 2018,
4 plaintiff took a part-time teaching assistant position with
5 the Chittenango Central School District where she works with
6 disabled students.

7 Physically, plaintiff suffers from a right shoulder
8 issue which has resulted in approximately five surgeries.
9 She is scheduled, or was at the time of the hearing, for a
10 release procedure and if that failed, it was indicated that
11 she may need a complete shoulder replacement. Plaintiff
12 testified that she undergoes trigger point injections and
13 nerve blocks three to four times per year for her shoulder
14 issue. She also suffers from osteoarthritis in the hands,
15 shoulder, and jaw, a hearing loss, and a condition known as
16 urinary cystitis which is generally described, as I
17 understand it, as a chronic condition causing bladder
18 pressure, bladder pain, and sometimes pelvic pain which can
19 range from mild discomfort to severe. The plaintiff has
20 undergone treatment for that which includes a cystoscopy and
21 suburethral sling insertion in December of 2015, and a
22 cystoscopy and bladder hydrodistention on February 26, 2019.
23 She also experiences hypertension, GERD and other
24 gastrointestinal issues, bilateral hearing issues for which
25 she uses hearing aids, and asthma, which appears to be fairly

1 controlled.

2 She has obtained treatment from TriValley Family
3 Practice with Dr. Harry Capone who appears to be her primary,
4 from New York Spine and Wellness she has obtained pain
5 treatment through Family Nurse Practitioner Mara Morabito,
6 her urologist and urosurgeon is Dr. Bashar Omarbasha. At
7 New York Spine and Wellness she has also seen Dr. Eric
8 Tallarico. She has obtained treatment at Upstate Orthopedics
9 through Dr. Kevin Setter and others, and she treats at
10 Digestive Disease Medicine of Central New York through
11 Dr. Robert Pavelock.

12 In terms of activities of daily living, plaintiff
13 is able to shower and dress with help from her husband, cook,
14 do laundry, do some housework, shop, watches television, uses
15 the computer, and writes. At 1054 of the administrative
16 transcript, plaintiff's history recites that she enjoys bow
17 hunting and gun hunting on her land. At page 656 there is an
18 indication that she fell out of a kayak. As plaintiff's
19 counsel notes, it's unclear whether she was operating the
20 kayak herself.

21 Procedurally, plaintiff applied for Title II
22 benefits on September 27, 2016. It was noted that a prior
23 claim for benefits from April 8, 2016 was denied. Plaintiff
24 requested reopening of that case. In her application, she
25 alleged an onset date of February 16, 2012, and at page 218,

1 alleged a host of conditions supporting her claim for
2 disability. A hearing was conducted on September 17, 2019 by
3 Administrative Law Judge Shawn Bozarth to address plaintiff's
4 application. ALJ Bozarth issued an unfavorable decision on
5 September 26, 2019. That became a final determination of the
6 agency on August 20, 2020 when the Social Security
7 Administration Appeals Council denied plaintiff's request for
8 review. This action was commenced on October 8, 2020 and is
9 timely.

10 In his decision, ALJ Bozarth applied the familiar
11 five-step sequential test for determining disability, first
12 noting that plaintiff was last insured on March 31, 2017, and
13 therefore the focus was on a closed period of February 16,
14 2012 to March 31, 2017.

15 At step one, it was noted that plaintiff has
16 engaged in some work activities, but that it did not rise to
17 a substantial gainful activity status.

18 At step two, ALJ Bozarth concluded that plaintiff
19 suffers from severe impairments that impose more than minimal
20 limitations on plaintiff's ability to perform basic work
21 activities, including asthma, degenerative joint disease of
22 the right shoulder, interstitial cystitis, bilateral hearing
23 loss, and osteoarthritis.

24 At step three, the ALJ concluded that plaintiff's
25 conditions do not meet or medically equal any of the listed

1 presumptively disabling conditions set forth in the
2 regulations, specifically considering Listings 1.02 and 3.03.

3 ALJ Bozarth next determined that notwithstanding
4 her conditions, plaintiff retains the residual functional
5 capacity, or RFC, to perform light work with various
6 exceptions, addressing, among other things and pertinent to
7 this challenge, the ability only to occasionally reach
8 laterally or overhead with the right upper extremity. He
9 also included a provision addressing plaintiff's
10 environmental issues, stating that the claimant needs to
11 avoid concentrated exposure to respiratory irritants such as
12 chemicals, dusts, odors, fumes, and gases, extremes of
13 temperature and humidity, as well as poorly ventilated work
14 areas. And lastly, again pertinent to this proceeding, it
15 was stated that the claimant can work jobs within close
16 proximity to bathroom facilities.

17 Applying that RFC, at step four, ALJ Bozarth
18 concluded that plaintiff is incapable of performing her past
19 relevant work due to the exertional requirements associated
20 with that work.

21 At step five, ALJ Bozarth initially noted that if
22 plaintiff could perform a full range of light work, a finding
23 of no disability would be directed by the Medical-Vocational
24 Guidelines set forth in the Commissioner's regulations, and
25 specifically Rule 202.14 of those guidelines. Because of the

1 additional limitations set forth in the RFC, the testimony of
2 a vocational expert was elicited and based on that testimony,
3 ALJ Bozarth concluded that plaintiff is capable of performing
4 available work in the national economy, citing as
5 representative positions usher, furniture rental clerk, and
6 counter clerk, all of which fall in the light category with
7 an SVP of 2. He therefore concluded that plaintiff was not
8 disabled at the relevant times.

9 The court's function, of course, in this case is
10 limited to determining whether correct legal principles were
11 applied and the result is supported by substantial evidence,
12 being defined as such relevant evidence as a reasonable mind
13 would find adequate to support a conclusion.

14 In support of her challenge, plaintiff raises four
15 basic contentions. First, she argues that the weight given
16 to opinions authored by Kenneth Carter, the physical
17 therapist, Dr. Elke Lorensen, the consultative examiner, and
18 FNP Mara Morabito, a treating nurse practitioner, was
19 improper.

20 Secondly, she challenges the RFC finding as not
21 supported by substantial evidence, contending that there is
22 no medical opinion that supports the RFC.

23 Third, she argues that plaintiff's RFC does not
24 take into account all of the effects of her interstitial
25 cystitis, including considering the number of bathroom breaks

1 required and whether it would exceed 10 percent of being off
2 task, which would preclude gainful employment.

3 And fourth, she challenges the administrative law
4 judge's evaluation of her subjective complaints.

5 There are a couple of overarching principles which
6 need to be taken into consideration first. It is plaintiff's
7 burden to show through step four the limitations that she
8 experiences based on her conditions, and that includes at the
9 RFC level. The second is that we're dealing with a closed
10 period, again, February 16, 2012 to March 31, 2017.

11 Plaintiff's focus in this matter is basically upon
12 the use of the right extremity to reach and her incontinence
13 and the number of times she would be required to go to the
14 bathroom while working.

15 Addressing first the weight of medical opinions,
16 because of the date on which plaintiff's application was
17 filed, the former regulations control. Under those
18 regulations, there are several factors which must be
19 considered or should be considered when determining the
20 weight to be assigned to a medical opinion, they're specified
21 in 20 C.F.R. Section 404.1527, and we sometimes in this
22 circuit refer to them as the *Burgess* factors. The opinions
23 here -- and I guess the other thing that should be recalled
24 is that under the Second Circuit's decision in *Veino*, it is
25 for the ALJ in the first instance to weigh medical opinions,

1 and the court is not permitted to simply reweigh the opinions
2 as the court would see fit.

3 In this case, the first opinion at issue was given
4 by Physical Therapist Kenneth Carter on December 4, 2015. It
5 appears at pages 329 to 331 of the administrative transcript.
6 In it, Mr. Carter recommends that plaintiff be limited to
7 sedentary work, with no shoulder reaching or overhead
8 reaching activities for the right upper extremity. It is
9 recommended no forward or outward reaching past the zone of
10 proximity for right upper extremity. In the summary at the
11 end, it is indicated that overhead reaching, overhead
12 lifting, shoulder lifting, and forward reaching values are
13 reflective of the left upper extremity which indicate
14 frequent in those areas, but right upper extremity lifting
15 maximum is one pound unilaterally within the zone of
16 proximity.

17 The administrative law judge analyzed that medical
18 opinion at page 17 and found that it was entitled to little
19 weight. The two reasons cited is that Mr. Carter is not an
20 acceptable medical source, which clearly he is not; and
21 second, it was based on a snapshot examination that was not
22 able to consider claimant's longitudinal treatment course. I
23 would say that I would hope for a little bit more
24 explanation, particularly as to how plaintiff's treatment
25 records are inconsistent with Mr. Carter's opinion, but I

1 think if you read the decision as a whole, it is, the
2 requirements are satisfied and I don't find any error in
3 considering Mr. Carter's opinions.

4 The second opinion given is from Nurse Practitioner
5 Morabito. It was given on December 12, 2016 and amended in
6 areas that really don't affect the arguments now before the
7 court on June 11, 2019. It appears at 1142 and 1143 of the
8 administrative transcript, and it basically states that
9 plaintiff should never reach above shoulder level.

10 The ALJ discussed Nurse Practitioner Morabito's
11 opinion at page 17 and gave it little weight and cited four
12 basic reasons: One, not being an acceptable source which of
13 course is true; second, it is inconsistent with the
14 plaintiff's own reported activities of daily living,
15 including kayaking and bow hunting; third, does not provide a
16 detailed rationale, which is true; and fourth, the opinion as
17 to disability is reserved to the Commissioner. Once again, I
18 think there was proper consideration of the nurse
19 practitioner's opinion, and while I agree with the plaintiff
20 that she probably has the most longitudinal knowledge of
21 plaintiff and plaintiff's shoulder treatment of the medical
22 opinions cited, nonetheless, the treatment of it as a whole
23 and reviewing the decision as a whole is proper.

24 The third of course is from Dr. Elke Lorensen who
25 conducted an examination of the plaintiff on November 4,

1 2016, which is during the relevant period. It was contained
2 in the record in 569 through 572. Significantly,
3 Dr. Lorensen found only moderate limitation for pushing,
4 pulling, and reaching with the right arm. There, the
5 administrative law judge accorded it partial weight at page
6 17 although, as the Commissioner's counsel has argued, the
7 residual functional capacity is actually more restrictive in
8 several regards than Dr. Lorensen's opinion. The reasons
9 cited are: This opinion is based on a single examination;
10 the source was not able to consider more recent treatment
11 notes or impairments; and it's vague about specific
12 limitations and not entirely consistent with more recent
13 progress notes. In my view it's a little unclear from
14 plaintiff's argument as to what portions of Dr. Lorensen's
15 opinion are inconsistent with the RFC. Dr. Lorensen did note
16 some limitation on reaching and did note some objective
17 limitations on range of motion of above shoulder at page 517
18 based on her examination of the plaintiff. The moderate
19 limitation, although I agree moderate is not always as
20 precise as one might hope, is accommodated in the residual
21 functional capacity and is consistent with the RFC. *Kristen*
22 *F. v. Commissioner of Social Security*, 2021 WL 1668933, from
23 the Northern District of New York, April 27, 2001, and
24 *Gilmore v. Commissioner of Social Security*, 2016 WL 4079535,
25 from the Northern District of New York, July 29, 2016.

1 In conclusion, I don't find any error in the weight
2 given to the medical opinions in the record.

3 The next focus is upon the residual functional
4 capacity finding. An RFC represents a finding of the range
5 of tasks a plaintiff is capable of performing notwithstanding
6 his or her impairments. It is informed by consideration over
7 claimant's physical activities -- abilities, mental
8 abilities, symptomology, including pain and other limitations
9 that could interfere with work activities on a regular and
10 continuing basis. The RFC in this case takes into
11 consideration plaintiff's shoulder and interstitial cystitis.

12 When it comes to the interstitial cystitis, the
13 issue's governed by SSR 15-1 which notes that in assessing an
14 RFC relative to this condition, we must consider all of the
15 person's impairments-related symptoms in deciding how much
16 the symptoms may affect functional capacity. Urinary
17 frequency can necessitate trips to the bathroom as often as
18 every 10 to 15 minutes day and night. Consequently, some
19 individuals with IC essentially may confine themselves to
20 their homes. In this case, the issue, the condition IC was
21 accommodated by the need for close proximity to the bathroom.
22 The plaintiff in my view failed to establish how, during the
23 relevant time period, her IC would preclude her from being
24 able to work and being off task more than 10 percent of the
25 day. The administrative law judge noted that recent

1 treatment records during the relevant period showed that
2 incontinence was not an issue, that's at page 16. At page
3 1102, Dr. Omarbasha noted that plaintiff was no longer
4 incontinent although he did acknowledge that the issue could
5 recur. At page 422, it was also noted, this is from
6 February 25, 2016, that following up on her surgery and the
7 placement of suburethral sling, plaintiff claimed that she
8 was 100 percent continent and was happy with the outcome of
9 her surgery.

10 So although I acknowledge that if there were
11 evidence plaintiff had carried her burden of establishing
12 that her IC is an ongoing problem and she had ongoing
13 incontinence of a severe nature, it would be incumbent on the
14 ALJ to analyze not only close proximity to a bathroom but
15 frequency of bathroom use, it was not necessary in this case
16 because plaintiff did not carry her burden.

17 I believe that the residual functional capacity,
18 for the reasons cited earlier, accommodated her shoulder
19 issue, as well as her asthma and her incontinence. It is
20 true that, as the plaintiff has argued, there is no one
21 medical opinion that perfectly corresponds with the RFC, but
22 that is not necessary, so long as there is substantial
23 evidence on which the RFC can be formulated. *Tankisi v.*
24 *Commissioner of Social Security*, 521 F.App'x 29, Second
25 Circuit 2013. As I know the judge of this court has noted in

1 *House v. Astrue*, 11-CV-915, 2013 WL 422058 from February 1,
2 2013, if there is sufficient evidence in the record and the
3 administrative law judge is not playing doctor and
4 interpreting raw medical data, a common sense residual
5 functional capacity can be formulated. In this case, that
6 was done and it draws considerable support not only from
7 Dr. Lorensen's opinion but from the medical treatment records
8 in issue. So I don't find any basis to conclude that the
9 residual functional capacity was not supported by substantial
10 evidence.

11 The last issue of course is the weighing of
12 plaintiff's claims of symptomology. The administrative law
13 judge applied the two-step analysis that is specified under
14 the regulations and Social Security Ruling 16-3p. He did
15 that at pages 15 to 18 and first noted plaintiff's complaints
16 or claims at page 14, and then went through carefully the
17 records associated with plaintiff's treatment of her shoulder
18 and IC conditions. He explained his finding at page 16,
19 summarized the reasons for his RFC finding, and concluded
20 that greater limitations were not supported by the evidence.
21 As the Commissioner argues, the ALJ's analysis of subjective
22 complaints is entitled to considerable deference, and I'm not
23 able to conclude in this case that there's any basis to
24 disturb it. I don't find that no reasonable fact finder
25 could conclude as the administrative law judge did, which of

1 course under such cases as *Brault* is the standard that I
2 apply.

3 So for those reasons, I conclude the correct legal
4 principles were applied and the result is supported by
5 substantial evidence. I will grant judgment on the pleadings
6 to the defendant and order dismissal of plaintiff's
7 complaint.

8 Thank you both, I hope you stay safe in these
9 interesting and challenging times.

10 MS. SLIMBAUGH: Thank you, your Honor.

11 MS. CARTER: Thank you, your Honor.

12 (Proceedings Adjourned, 10:47 a.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
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District of New York, DO HEREBY CERTIFY that
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the United States.

Dated this 19th day of January, 2022.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter